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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LEROY HUNTER,

Defendant and Appellant.

A123162

(Alameda County  
Super. Ct. No. 150625)

James Leroy Hunter appeals from a judgment imposed following revocation of his probation. He contends that the trial court erroneously sentenced him to nine years in state prison because it sentenced him on a “strike” prior that had been dismissed by another court in accordance with his plea agreement. The Attorney General agrees that the court erred in how it calculated the nine-year term, but contends that a remand is unnecessary because it is not reasonably probable that defendant would receive a lesser sentence on remand. We remand the matter to the trial court for it to reconsider its sentencing decision in light of the strike dismissal and defendant’s exposure under the terms of the plea agreement.

**I. FACTUAL BACKGROUND**

On October 12, 2005, defendant entered a plea of no contest to one count of selling cocaine (Health & Saf. Code, § 11352, subd. (a)); he admitted the allegations that he suffered a prior burglary conviction that qualified as a “strike” (Pen. Code,<sup>1</sup> §§ 667,

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

subd. (e)(1), 1170.12, subd. (c)(1)), that he served a prior prison term (§ 667.5, subd. (b)), and that he suffered a prior narcotics offense conviction (Health & Saf. Code, § 11370.2, subd. (a)). On January 6, 2006, the court, on its own motion and in the interest of justice, dismissed the “strike” allegation, suspended imposition of sentence and placed defendant on probation for five years on conditions, including that he obey all laws.

On May 27, 2008, a petition to revoke probation was filed alleging that defendant violated the conditions of probation because he was arrested for possessing cocaine base for sale. On October 20, 2008, following a contested revocation hearing, the court found defendant to be in violation of probation.

The court proceeded with sentencing. Initially, it expressed confusion over notations in defendant’s file indicating a nine-year exposure while the court’s own calculation resulted in a 14-year sentence, including doubling the base term for the “strike” allegation. Defense counsel suggested that the court review the change of plea transcript but it apparently was not in the file. Despite the discrepancy, the court agreed to abide by the record’s notation of nine years. The court sentenced defendant to nine years in prison, finding that there were several factors in aggravation: His prior convictions as an adult were numerous, his convictions continued to be quite serious for the community, he had served a prior prison term, and his performance on probation was unsatisfactory. The court imposed the low term of three years on the cocaine sale offense, doubled that term to six years pursuant to the three strikes law, and added a consecutive three years for the Health and Safety Code section 11370.2 prior narcotics enhancement and a concurrent one-year term on the section 667.5, subdivision (b) enhancement.

## **II. DISCUSSION**

The Attorney General concedes that the court erred in sentencing defendant pursuant to the three strikes law because the court had previously dismissed the allegation that defendant’s prior conviction was a “strike” on January 6, 2006, as part of defendant’s plea agreement. (See *People v. Collins* (1996) 45 Cal.App.4th 849, 863 (*Collins*) [a defendant is entitled to the benefit of his plea bargain].) While the Attorney General

agrees that the strike prior must be stricken from the abstract of judgment, he does not agree that defendant is entitled to a remand for resentencing. He argues that it is not reasonably probable that the trial court would impose less than a nine-year term on remand. We cannot agree.

Although the court's remarks at sentencing noted that aggravating factors were present, the court also expressed its confusion about defendant's maximum exposure and believed that he faced a 14-year maximum term rather than a nine-year term.<sup>2</sup> Moreover, the court was operating under the erroneous belief that defendant was subject to the three strikes law; but under his plea agreement, the court had agreed to dismiss the "strike" allegation in the interest of justice under section 1385. Having done so, defendant was entitled to the benefit of a sentencing hearing in which the court was not considering his sentence in light of that "strike" allegation. (See *Collins, supra*, 45 Cal.App.4th at p. 863 [reciprocal nature of a plea bargain agreement mandates that either party to the agreement be entitled to enforce it when the party is deprived of the benefit of the bargain].)

"When a court strikes prior felony conviction allegations . . . , it ' "does not wipe out such prior convictions or prevent them from being considered in connection with later convictions." ' [Citation.] Instead, the order striking such allegations simply embodies the court's determination that, ' "in the interest of justice" defendant should not be required to undergo a statutorily increased penalty which would follow from judicial determination of [the alleged] fact.' " (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 508.) Here, the court's sentence utilized defendant's "strike" allegation in doubling the term, and though defendant's sentence did not exceed his maximum exposure, it is reasonably probable that the court considered defendant's "strike" status in determining his ultimate sentence. Since defendant is entitled to the benefit of his plea agreement, and a sentencing hearing in which the court is aware of his true exposure

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<sup>2</sup> The 14-year term would have consisted of 10 years for the sale of cocaine offense (the aggravated term of five years doubled), plus consecutive terms of three years and one year for the Health and Safety Code section 11370.2 and the section 667.5, subdivision (b) enhancements, respectively.

under the agreement and is not considering the statutory penalty for a “strike” defendant, we remand the matter for resentencing.

### **III. DISPOSITION**

The matter is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.

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RIVERA, J.

We concur:

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RUVOLO, P.J.

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SEPULVEDA, J.